BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matters of	)	
	)	
Petition for Declaratory Ruling That VarTec Telecom, Inc. is not Required to Pay Access Charges to Southwestern Bell Telephone Company or Other Terminating Local Exchange Carriers When Enhanced Service Providers or Other Carriers Deliver the Calls to Southwestern Bell Telephone Company or Other Local Exchange Carriers for Termination	)	WC Docket No. 05-276
	)	
and	)	
	)	
Petition for Declaratory Ruling That UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers are Liable for Access Charges	)	

REPLY COMMENTS OF JOINT CLEC COMMENTERS

NuVox Communications, XO Communications and Xspedius Communications, Inc. ("Joint CLEC Commenters"), by their attorneys and in accordance with the FCC's Public Notice,[1] hereby file reply comments in the above-referenced docket.

The Petitions for Declaratory Ruling filed both by SBC Communications ("SBC"), on behalf of its incumbent local exchange carrier ("ILEC") affiliates, and by VarTec Telecom, Inc. ("VarTec") focused on questions in an IP-in-the-middle call scenario regarding which providers are to be treated as interexchange carriers ("IXCs") and which IXCs in a multiple IXC scenario can be assessed access charges.[2] The Joint CLEC Commenters, in their

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1 Public Notice, *Pleading Cycle Established for SBC's and VarTec's Petitions for Declaratory Ruling Regarding the Application of Access Charges to IP-Transported Calls*, DA 05-2514, WC Docket No. 05-276 (Sep. 26, 2005).

2 Petition of the SBC ILECs for a Declaratory Ruling, filed by Southwestern Bell Telephone, L.P., *et al.*, WC Docket No. 05-276 (Sept. 19, 2005) ("*SBC Petition*");

. . .*Continued*

opening comments, did not take a position on the outcome of the central questions raised by the Petitions. Instead, they urged the Commission to confirm, if the Commission determines that access charges apply to the call scenarios under discussion, that, under the Act and current Commission Rules, LECs are *not* subject to access charges unless they choose to bind themselves contractually. While the majority of the over two dozen other comments focused principally on the Petitions' central questions regarding who is an IXC and which IXCs can be liable for LEC access charges, there were a number of issues raised concerning or potentially affecting CLECs to which a response is warranted. The Joint CLEC Commenters will focus these Reply Comments on those points.

More specifically, the record developed thus far raises a number of issues regarding the knowledge that can be imputed to a carrier, particularly CLECs, in an actual case of interexchange traffic diversion, as well as the burden that attaches to a terminating LEC that seeks access charges against an upstream carrier, whether directly connected or not. For example, the United States Telecom Association ("USTA") states, in opposition to the VarTec Petition, interexchange carriers in a multiple carrier situation where access charges should apply, especially the "originating" IXC that serves the calling party, are in a completely different position than a CLEC selling local services to the next "upstream" provider.[3] USTA's implication is that the originating IXC is in the best position to know the nature of the traffic and, that, if it is traffic otherwise subject to access charges, that the traffic has been sent downstream in such a way that it is or is not likely to be diverted. Assuming that USTA is correct about the originating IXC, USTA's position is supportive of a second conclusion regarding the termination

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Petition for Declaratory Ruling, filed by VarTec, WC Docket No. 05-276 (August 20, 2004) ("*VarTec Petition*").

3 USTA Comments at 7.

of the call to a CLEC's network: a CLEC whose customer claims to be an enhanced service provider or sending enhanced traffic is in the *weakest* position to know what is truly going on, all other things being equal.[4]

Qwest states that, where a CLEC "is directly and actively involved in the unlawful scheme to improperly divert traffic into the local network," that CLEC can be liable to a terminating LEC for access charges on that basis alone.[5] Qwest does not say what "directly and actively" involved means, but it should be more than the CLEC is providing local business services to an upstream provider that proves to be sending traffic subject to access charges. Instead, for a CLEC to even be potentially liable, the CLEC must be aware or have reason to conclude that its local business services are being ordered by a Customer with the intent of diverting what would otherwise be traffic subject to access charges. Moreover, although Qwest's comments are directed at CLECs, they should and do apply equally well to any ILEC, of course.

The Joint CLEC Commenters agree with Qwest that a terminating LEC seeking to collect access charges has the affirmative burdens to prove that the terminating LEC is entitled to collect access charges for improperly diverted traffic, that the traffic was improperly diverted, and the liability of each defendant.[6] However, Qwest does not adequately explain how these principles would apply were an ILEC, for example, attempting to recover access charges from a CLEC, even if it were "directly and actively" involved, in the manner described above. Where

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4 For this reason, the *Grande Petition* in docket WC 05-283 should be granted. The Joint CLEC Commenters are filing, under separate cover, comments in support of the *Grande Petition.*

5 Qwest Comments at 22.

6 Qwest Comments at 23-24.

an ILEC would seek to collect access charges from a CLEC, it has the burden to prove that the CLEC is liable under existing law, regulations, and tariffs. This inquiry, in light of the Commission's rules allowing access charges to be collected only against an IXC or an end user customer – and *not* against another LEC absent a voluntary agreement or tariff – requires the terminating LEC to demonstrate the basis for the CLEC's liability despite the Commission rule proscribing the collection of access charges from LECs. For example, the terminating LEC has the burden to show that the CLEC acted as an IXC, that the CLEC violated an interconnection agreement or tariff in question (and that the tariff is consistent with the FCC's rules and the Communications Act), and that this somehow resulted in alleged access charge liability as opposed to some other potential liability. No presumptions in favor of a CLEC's liability should be created even where an ILEC can demonstrate that an upstream carrier, even if that carrier handed the traffic directly off to the CLEC, is liable for access charges. In sum, the liability of the CLEC must be separately proven.

In seeming contradiction, however, with its comments about burden, Qwest contends that a LEC is liable for access charges "where it provides local facilities (e.g., PRI/PRS services) to an entity improperly claiming to be offering enhanced services, and it has not taken minimum, affirmative steps to prevent misuse of its local services when it becomes aware of such misuse."[7] The Commission cannot in *this* proceeding concur with Qwest's position as a general principle for the simple reason the that Commission's rules do not allow access charges to be assessed against LECs, and the activities described by Qwest would not transform a LEC

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7 *Id.* at 22-23.

into an IXC.[8] In other words, the standard Qwest suggests to apply against a CLEC – "minimum, affirmative steps" – would only be relevant if the CLEC's failure to take those steps resulted in liability for access charges under an applicable tariff or contract.[9]

In contrast with Qwest's mostly reasonable approach regarding the burden of the terminating LEC that seeks to recover access charges, USTA contends that the Commission should create incentives to make it easier for terminating LECs to collect access charges and allow for finger-pointing among "defendants" to work it out among themselves.[10] Although it is not completely clear what USTA is suggesting, the implication is that the Commission create a rule relieving the terminating LEC of demonstrating exactly who is liable for access charges under its tariff and simply charging a "likely suspect."[11] While the USTA Comments do not

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8 Qwest contends that what steps a CLEC must take is the subject of the *Grande Petition* in WC Docket No. 05-283. *Id.* at 23 and n.56. This is incorrect, as the *Grande Petition* concerns itself with the more limited question of whether a LEC, *where* it receives a certification from a customer that the customer is an enhanced service provider, can rely on that certification and provide the customer local business services if the LEC does not have reason to conclude the certification is incorrect. What steps a CLEC *must* take if approved by a would-be Customer claiming to provide entranced services is a matter for another proceeding.

9 Exactly what those steps would be are not suggested by Qwest. Qwest contends that what steps a CLEC must take is the subject of the *Grande Petition* in WC Docket No. 05-283. Qwest Comments at 23 and n.56. This is incorrect, as the *Grande Petition* concerns itself with the more limited question of whether a LEC, *where* it receives a certification from a customer that the customer is an enhanced service provider, can rely on that certification and provide the customer local business services if the LEC does not have reason to conclude the certification is incorrect. What steps a CLEC *must* take if approved by a would-be customer claiming to provide entranced services is a matter for a different proceeding.

10 USTA Comments at 8-9.

11 In a related vein, BellSouth contends that wholesale providers that contract with CLECs "often allow CLECs to pass through the access charges assessed by the ILEC." BellSouth Comments at 16 & n. 37. The Joint CLEC Commenters question the accuracy of BellSouth's contentions, which is not consistent with their own practices. It is not unusual, by contrast, for CLECs to include clauses in contracts with local business

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specifically bring CLECs into this dragnet, the logic would seem to suggest it.[12] The Commission should flatly reject any such proposal and make clear that the burden rests with the terminating LEC to prove that each defendant from which it would recover access charges is liable.[13]

At the extreme end of the spectrum is Alltel, which expressly contends that CLECs and IXCs are in cahoots to escape paying access charges.[14] Alltel's assertions are totally unsupported with details, but in any event Alltel cannot escape the burden for it to demonstrate

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customers that provide enhanced or IP-enabled services that, if the customer's traffic is found to be subject to access charges, that if any access charges are assessed against the CLEC as a result, a CLEC may pass them through. This is not the same as saying that a CLEC has agreed to be billed the access charges of an upstream carrier and pass them through. As noted above, the terminating LEC seeking to assess access charges must specifically demonstrate the liability of any given defendant.

12 Several other commenters flirt with suggesting that a terminating ILEC should just charge the next upstream carrier. *See, e.g., Earthlink Comments* at 6-8. Any such suggestion must be flatly rejected, not only because it would be in violation of the Commission's rules to assess access charges on CLECs or intermediate LECs, as Joint CLEC Commenters and others discussed in their initial comments (*e.g.,* Level 3 Comments at 8), but it ignores the well-established practice of joint provision of access services by two or more LECs (*see* Pac-West Comments at 4-5). As Qwest notes, the Commission, in resolving the Petitions, should recognize the difference between proper application of access charges to interexchange traffic and "unlawful attempts to assess tariffed access charges on LEC transit providers – to which these tariffs do not apply." Qwest Comments at 4, n. 7. *See also id.* at 13, n. 46. By "LEC transit providers," the Joint CLEC Commenters understand Qwest to be talking about any LEC that participates in the termination of the call but does not serve the called party.

13 Only where the burden of proving access charge liability against more than one defendant is met by the terminating LEC would the Joint CLEC Commenters agree with the statement of SBC that each defendant in an access charge collection case *could be* jointly and severally liable. SBC Comments at 15-16. Even then, whether the defendants are actually jointly and severally liable depends upon the source for each defendant's liability and the terminating LEC's basis for recovery against each defendant.

14 Alltel Comments at 5, 7. Alltel asserts that "a number of IXCs and CLECs participating in similar routing schemes [as described in the SBC Petition] are disputing lawful access charges rendered by Alltel for terminating access services." The *Grande Petition* made clear that Grande is one of the CLECs against whom Alltel is assessing access charges. *Grande Petition* at 9.

liability on each IXC's and CLEC's part against whom it would seek to assess charges. Moreover, although the SBC and VarTec Petitions do not present the opportunity to resolve Alltel's allegations, Alltel's comments reflect the all too increasingly familiar cry for automatic liability against CLECs that a number of ILECs have assumed in recent times whenever the ILEC seeks to assess access charges against an indirect upstream provider. As Level 3 notes, in an attempt to temper such hysteria, not every dispute, and maybe very few disputes, over access charges or traffic diversion involves a conspiracy between CLECs and other providers to dupe the ILECs.[15] Moreover, there are several perfectly legitimate reasons why a carrier other than an ILEC may be the legitimate first point of local switching for an upstream provider.[16] These reasons should not and cannot be categorically addressed by this Commission or another body but must be examined in each individual case.

Finally, the Joint CLEC Commenters support the position of Pac-West Telecomm and Level 3 that, where it is determined that a local business customer is sending interexchange traffic subject to access charges over local lines in an attempt to divert traffic, the LEC should be able to reclassify the traffic as access charge traffic and begin to assess access charges without receiving an express access service request from the customer.[17] In such a case, it may be necessary for the LECs involved to file amendments to their tariffs to give them the ability to convert the customers in the case where the traffic diversion has been discovered. Alternatively,

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15 Level 3 Comments at 4.

16 *E.g.*, Level 3 Comments at 8 (describing situations where non-ILECs may provide competitive tandem services or IP-to-PSTN gateway services not available from the ILEC).

17 Pac-West Telecomm states that "if the Commission determines that the wholesale transmission provider is an IXC, then CLECs are entitled to be paid access for the portion of the service they provide to the IXC." Pac-West Comments at 2. *See also* Level 3 Comments at 10-11.

but perhaps less desirable for consumers, the LECs should be entitled to terminate the local services since the customer is using them to an illegitimate end.

CONCLUSION

For the reasons set forth above and in the Joint CLEC Commenters initial comments, in ruling on the SBC and VarTec Petitions, the Commission should confirm that, under the Act and current Commission Rules, LECs are not subject to access charges on interstate and foreign telecommunications unless they choose to bind themselves contractually. Access charge liability on the part of a CLEC, as with any other carrier, must be specifically demonstrated in a tariff or contract, and consistent with the Commission's rules, even if another carrier in a multi-carrier situation is found liable or admits to access charge liability. The burden of proof in any case in which a terminating LEC seeks to recover access charges should lie with the terminating LEC.

Respectfully submitted,

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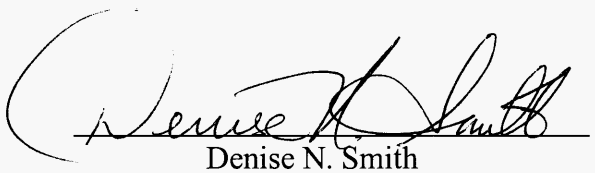
CERTIFICATE OF SERVICE

I, Denise N. Smith, hereby certify that on this 12th day of December 2005, copies of the foregoing **"Reply Comments of Joint CLEC Commenters"** were: 1) filed with the Federal Communications Commission via its Electronic Comment Filing System; 2) served, via e-mail, on Jennifer McKee, Pricing Policy Division, Wireline Competition Bureau at jennifer.mckee@fcc.gov; and 3) served, via e-mail, on Best Copy and Printing, Inc. at fcc@bcpiweb.co.



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